

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of)	
)	
AT&T Inc. and)	MB Docket No. 14-90
DIRECTV)	
)	
For Consent To Assign or)	
Transfer Control of)	
Licenses and Authorizations)	

COMMENTS OF COGENT COMMUNICATIONS GROUP, INC.

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Cogent Communications Group, Inc. (“Cogent”) submits these comments concerning the applications of AT&T, Inc. (“AT&T”) and DIRECTV (“DIRECTV”) (together, the “Applicants”) for consent to assign or transfer control of licenses and authorizations (henceforth the “transaction” or “merger”). In sum, Cogent urges that, in order to find that the transaction comports with the public interest, the Federal Communications Commission (the “Commission” or “FCC”) must impose meaningful and targeted conditions that address the specific threats to the delivery of Internet content and to the functionality of Internet applications posed by the merger.

I. Introduction

AT&T is one of the nation’s leading telecommunications companies, with over 16 million wireline Internet subscribers and approximately 5.8 million video subscribers.¹ As an Internet service provider (“ISP”), multichannel video programming distributor (“MVPD”), and provider of voice services operating in twenty-two states,² AT&T has incentives to limit the growth of online video distributors (“OVDs”) and other existing and emerging edge providers who pose a competitive threat to AT&T’s lines of business.

DIRECTV is a nationwide MVPD offering satellite television services to over 20 million subscribers across the country and an additional 18 million in Latin America.³ DIRECTV holds ownership interests in a variety of regional sports networks and other television networks.⁴ As a

¹ AT&T Inc. Quarterly Report (Form 10-Q) at 29 (Aug. 1, 2014), *available at* http://www.sec.gov/Archives/edgar/data/732717/000073271714000110/q2_10q.htm (last visited Sept. 15, 2014).

² *In the Matter of Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Description of Transaction, Public Interest Showing, and Related Demonstrations (filed June 16, 2014) at 10 (“Application”).

³ Application at 13.

⁴ *Id.* at 14.

vertically integrated MVPD, DIRECTV also has incentives to insulate its video offerings from competition.

The proposed combination of AT&T and DIRECTV will transform the telecommunications and media landscape overnight, creating a new company with massive scale, a nationwide footprint, and significantly expanded capabilities to provide Internet and video services to millions of consumers. With this increased scale will come increased incentives and leverage to discriminate against Internet content that would compete with the merged firm's video offerings, such as the services offered by OVDs like Netflix, Hulu, and YouTube, as well as with the firm's telephony offerings, such as voice-over-IP ("VoIP") services offered by providers like Skype and Vonage.

Cogent is a multinational Tier 1 Internet service provider offering facilities-based, low-cost, high-speed Internet access and Internet Protocol communications services to businesses across thirty-eight countries. As a Tier 1 ISP and transit provider, Cogent carries Internet traffic from edge providers across thousands of miles to other ISPs, including residential, last-mile ISPs like AT&T, and to its own business customers. Cogent's core business philosophy is—and has always been—that Internet access should be marketed, bought and sold as a commodity. Cogent further operates its business on the premise that constantly lower prices will spur demand, increase usage, and drive innovation. As a result, Cogent has contributed to the explosive growth in Internet traffic by making affordable, reliable, and fast Internet data transit services available to thousands of innovative edge providers.

The transaction raises public interest concerns because the merged entity will have a substantially augmented base of customers which, in turn, will magnify the adverse impact of any measures taken to interfere with the ability of such customers to access any lawful Internet

content or services of their choosing. The Commission need not speculate as to whether the incentives and leverage to engage in such conduct exist, as there is recent precedent directly on point. AT&T has already discriminated against competing content by refusing to upgrade interconnection ports between its network and Cogent's network, thereby degrading its end users' experiences with bandwidth-intensive and latency-sensitive services like online video and VoIP. Notably, AT&T's departure from its historical port-augmentation practices came in the wake of Cogent carrying Netflix traffic. Furthermore, by then extracting a paid, direct-connection arrangement from Netflix simply for delivering the Netflix content that AT&T's own customers request and for which they already pay AT&T, AT&T has shown its ability to raise prices for access to its Internet subscribers, many of whom lack other viable options for obtaining broadband service. The merger, should it proceed without meaningful conditions, would create a significantly more powerful gatekeeper equipped with strengthened incentives to thwart competition in these, and perhaps other, ways.

None of the voluntary commitments that Applicants propose will cure these harms. Instead, as explained below, the Commission must impose merger-specific conditions that address the specific threats to unaffiliated Internet content and services posed by the transaction if it is to approve this merger.

II. Standard of Review

Sections 214(a) and 310(d) of the Communications Act of 1934, as amended (the "Communications Act" or "Act"), require the Commission to determine whether "the Applicants have demonstrated that, on balance, the merger will serve the public interest and convenience."⁵

⁵ *In the Matter of Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner Inc. & America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Mem. Op. & Order, 16 FCC Rcd 6547, 6554 ¶ 20 (2001) ("AOL/Time Warner Order"); see also *In the Matter of Applications of Comcast Corp., Gen. Elec. Co. & NBC*

The Commission’s public interest analysis is far-reaching and requires evaluating the merger under antitrust principles as well as “the broad aims of the Communications Act.”⁶ The Commission “must determine whether the merger violates [its] rules, or would otherwise frustrate [its] implementation or enforcement of the Communications Act and federal communications policy.”⁷ While the Commission takes into account antitrust principles in its public interest analysis,⁸ its competitive analysis is necessarily broader than that of the Department of Justice. “[T]he Commission considers whether a transaction will enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.”⁹

In conducting the public interest analysis, the Commission also considers the extent to which the merger will further the Communications Act’s broad aims, which include “a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public.”¹⁰ The Commission also considers whether the merger will

Universal, Inc., MB Docket No. 10-56, Mem. Op. & Order, 26 FCC Rcd 4238, 4248 ¶ 23 (2011) (“*Comcast/NBC Universal Order*”).

⁶ *In the Matter of Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations from Tele-Comm’ns, Inc., Transferor to AT&T Corp., Transferee.*, CS Docket No. 98-178, Mem. Op. & Order, 14 FCC Rcd 3160, 3169 ¶ 14 (1999).

⁷ *Id.*

⁸ *Id.*; see also *AOL/Time Warner Order* at 6550 ¶ 4 (The Commission’s analysis “encompasses an examination of anticompetitive effects but also evaluates . . . the potential impact of the proposed transaction on the rules, policies, and objectives of the Communications Act”). Under antitrust jurisprudence, anticompetitive effects are assessed under the framework set forth in the Horizontal Merger Guidelines, U.S. Dep’t of Justice & Fed. Trade Comm’n, Aug. 19, 2010 (“Horizontal Merger Guidelines”), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (last visited Sept. 15, 2014).

⁹ *Comcast/NBC Universal Order* at 4248 ¶ 24.

¹⁰ *Id.* at 4248 ¶ 23; see also *AOL/Time Warner Order* at 6550 ¶ 4 (listing, as a major objective of the Act, “providing enhanced telecommunications services to all Americans as quickly as possible”). The

“affect the quality of telecommunications services provided to consumers.”¹¹ The Commission may evaluate the transaction’s effect on the industry by looking at “the trends within, and needs of, the telecommunications industry,” as well as “the nature, complexity, and rapidity of change in the telecommunications industry.”¹²

The Commission then employs “a balancing test, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.”¹³ The Applicants “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”¹⁴ If the Commission is “unable to find that the proposed transaction serves the public interest, or if the record presents a substantial or material question of fact, section 309(e) of the Act requires that [the Commission] designate the application for hearing.”¹⁵

Furthermore, and of particular import here, the Commission’s broad, public interest authority enables it to, consistent with its extensive regulatory and enforcement experience,

Act defines “advanced telecommunications capability” to include “broadband telecommunications capability.” 47 U.S.C. § 1302(d).

¹¹ *In the Matter of Application of Worldcom, Inc. & MCI Commc’ns Corp. for Transfer of Control of MCI Commc’ns Corp. to Worldcom, Inc.*, CC Docket No. 97-211, Mem. Op. & Order, 13 FCC Rcd 18025 ¶ 9 (1998) (“*Worldcom/MCI Order*”).

¹² *Id.*; see also *Comcast/NBC Universal Order* at 4248 ¶ 23 (“Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. In conducting this analysis, the Commission may consider technological and market changes as well as trends within the communications industry, including the nature and rate of change.”).

¹³ *Comcast/NBC Universal Order* at 4247 ¶ 22; see also *In the Matter of SBC Commc’ns Inc. & AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Mem. Op. & Order, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) (“*SBC/AT&T Order*”); *In the Matter of Applications filed by Global Crossing Ltd. & Level 3 Commc’ns, Inc. for Consent to Transfer Control*, IB Docket No. 11-78, Mem. Op. & Order & Declaratory Ruling, 26 FCC Rcd 14056, 14061 ¶ 10 (2011) (“*Global Crossing/Level 3 Order*”).

¹⁴ *SBC/AT&T Order* at 18300 ¶ 16.

¹⁵ *Id.* at 18301 ¶ 16 n.63.

“impose and enforce narrowly tailored, transaction-specific conditions to ensure that the public interest is served” and that “public convenience and necessity may require.”¹⁶

III. The Merged Firm Would Have Greater Incentives And Bargaining Power To Insulate Its Vastly Expanded Video Offerings From Competition By Unaffiliated Internet Content Providers And To Raise Such Competitors’ Costs.

As vertically integrated companies, AT&T and DIRECTV¹⁷ hold obvious incentives to prefer their respective content offerings. The combination of the firms will not only strengthen those incentives, but will give the merged entity greater bargaining power to act on those incentives. What AT&T lacks in video subscribership numbers will be amply compensated for by the acquisition of DIRECTV, the second-largest MVPD in the country, with over 20 million subscribers.¹⁸ Moreover, access to AT&T’s vast wireline and wireless Internet networks will give DIRECTV greater ability to sell its video offerings to subscribers across new platforms.

The cost to carry out this transaction is great: over \$48 billion.¹⁹ The enormous expenditure AT&T is making to obtain DIRECTV’s video capabilities is an investment the merged firm will seek to protect in part by ensuring, to the greatest degree possible, that its captive subscribers consume only its proprietary or favored content, increasing its incentives and

¹⁶ *Global Crossing/Level 3 Order* at 14063-64 ¶ 13; *see also Comcast/NBC Universal Order* at 4249 ¶ 25.

¹⁷ *See* Application at 13 n.19, 14 (listing AT&T’s and DIRECTV’s ownership interests in programming content).

¹⁸ *Id.* at 13. AT&T’s motivations for entering into this transaction are apparent, and include increasing subscribership in order to compete against Comcast Corp. (“Comcast”) and Time Warner Cable, Inc. (“TWC”), whether as separate entities or as a post-merger behemoth, should the Comcast/TWC transaction be approved. *See id.* at 25 (“AT&T has only one reliable option to lower its content costs in a reasonable time frame to compete effectively with Comcast: expand its customer base significantly.”). Put differently, AT&T is pursuing the transaction to enhance its leverage with programming suppliers.

¹⁹ Diane Bartz, *Exclusive: State attorneys general probing AT&T deal for DirecTV*, Reuters (Sept. 11, 2014), <http://www.reuters.com/article/2014/09/11/us-directv-att-antitrust-exclusive-idUSKBN0H61ZZ20140911>.

abilities to discriminate against OVDs and unaffiliated or disfavored content that is consumed over the Internet.

AT&T has shown that it is willing and able to discriminate against OVDs by allowing congestion at interconnection points between its last-mile network and backbone networks. Should the merger proceed, the adverse effects of such conduct will be magnified. The combined company would integrate significant video assets with a substantially larger base of subscribers and a huge network across which to disseminate video. As a result, the impact of impeding the ability of unaffiliated or disfavored edge providers to reach AT&T's last-mile broadband customers—whether through direct connections, transit providers or content delivery networks—will be of greater consequence.²⁰

A. The Merged Firm Will Have Strengthened Incentives To Discriminate Against Unaffiliated Online Video Content.

The Commission, the Department of Justice, and the U.S. Court of Appeals for the D.C. Circuit have all recognized the anticompetitive incentives and abilities that arise from the combination of vertically integrated content and control over broadband Internet access:

- “AT&T could profit from the creation and exercise of such market power either through direct ownership of a favored [service], or by obtaining payments from favored [services] in exchange for favorable treatment by [its broadband services]. By exploiting its ‘gatekeeper’ position in the residential broadband content market AT&T could make it less profitable for unaffiliated or disfavored [services] to invest in the creation

²⁰ See Comments of Am. Antitrust Inst., MB Docket No. 14-57 (filed Aug. 25, 2014), at 18 (“Post-merger, Comcast-TWC will be in a better position to act on competitive threats to its own content platforms by controlling whether, what, and when content and services are allowed through the Comcast-TWC ISP gate.”) (“AAI Comments”); Letter from Jeffrey H. Blum, Senior Vice President and Deputy General Counsel, DISH, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Sept. 9, 2014), at 2 (Comcast-TWC merger would give the merged firm “increased incentive and ability to leverage its control over the broadband pipe to undermine” broadband and OTT services). While the foregoing comments were submitted in the Comcast/TWC proceeding, the conclusions are equally applicable here.

of attractive broadband content, and thereby reduce the quantity and quality of content available.”²¹

- “[W]e have concerns that the merger may give AOL Time Warner the ability and the incentive to discriminate against the interactive television . . . services of unaffiliated video programming networks”²²
- “Today, broadband providers have incentives to interfere with the operation of third-party Internet-based services that compete with the providers’ revenue-generating telephony and/or pay-television services.”²³
- “[B]roadband providers may have economic incentives to block or otherwise disadvantage specific edge providers or classes of edge providers, for example by controlling the transmission of network traffic over a broadband connection, including the price and quality of access to end users. A broadband provider might use this power to benefit its own or affiliated offerings at the expense of unaffiliated offerings.”²⁴
- “OVDs would be harmed competitively if ISPs that are also MVPDs (*e.g.*, cable companies, telcos) were to impair or delay the delivery of video because OVDs pose a threat to those MVPDs’ traditional video programming distribution businesses. Because Comcast is the country’s largest ISP, an inherent conflict exists between Comcast’s provision of broadband services to its customers, who may use this service to view video programming provided by OVDs, and its desire to continue to sell them MVPD services.”²⁵
- “[W]e also identify particular transaction-related harms that arise from the increased risk that Comcast will engage in blocking or discrimination when transmitting network traffic over its broadband service. Specifically, we find that

²¹ *United States v. AT&T*, Case No. 1:00-cv-01176, Complaint at 12-13 ¶ 34 (D.D.C. May 25, 2000) (“AT&T Complaint”).

²² *AOL/Time Warner Order* at 6554 ¶ 18.

²³ *In the Matters of Preserving the Open Internet; Broadband Indus. Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report & Order, 25 FCC Rcd 17905, 17916 ¶ 22 (2010) (“*Open Internet Order*”).

²⁴ *Open Internet Order* at 17915 ¶ 21.

²⁵ *United States v. Comcast Corp.*, Case No. 1:11-cv-00106, Competitive Impact Statement at 11 (D.D.C. Jan. 18, 2011).

Comcast’s acquisition of additional programming content that may be delivered via the Internet, or for which other providers’ Internet-delivered content may be a substitute, will increase Comcast’s incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers’ broadband connections.”²⁶

- “Equally important, the Commission has adequately supported and explained its conclusion that, absent rules such as those set forth in the *Open Internet Order*, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment. First, nothing in the record gives us any reason to doubt the Commission’s determination that broadband providers may be motivated to discriminate against and among edge providers.”²⁷
- “The Commission also convincingly detailed how broadband providers’ position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers.”²⁸

In light of the consistent assessments of the FCC, the DOJ, and the D.C. Circuit, there can be no doubt that the merged firm’s control over content and a vast distribution network for that content creates incentives to discriminate against unaffiliated content.

The Applicants essentially acknowledge as much by making clear that their motivations for this merger include counteracting the competitive and increasing threats posed by OVDs. For example, Lori M. Lee, AT&T’s Senior Executive Vice President, notes that “the growing popularity” of OVDs like Netflix, Hulu, and YouTube “threatens a fundamental change in the way video services are delivered and consumed.”²⁹ Paul Guyardo, DIRECTV’s Executive Vice President, puts the threat in concrete terms, noting that, in 2013, 18 percent of U.S. households

²⁶ *Comcast/NBC Universal Order* at 4275 ¶ 93.

²⁷ *Verizon v. F.C.C.*, 740 F.3d 623, 645 (D.C. Cir. 2014).

²⁸ *Id.* at 646.

²⁹ Declaration of Lori M. Lee, Senior Exec. Vice President – Home Solutions for AT&T Inc. ¶ 42 (“Lee Decl.”).

with a Netflix or Hulu account did not have MVPD-provided services.³⁰ He concludes that “online video is fast becoming a viable option for many consumers.”³¹

To compete with its current and nascent video rivals, Applicants state that they will offer attractive and competitive bundles.³² But what they do not state is that the combined entity will have every incentive to protect its bundled video offerings—whether in the form of traditional MVPD services or a new, over-the-top (“OTT”) product—from competition from unaffiliated OVDs.³³ This is of particular concern because a bundled video and broadband offering is

³⁰ Declaration of Paul Guyardo, Exec. Vice President & Chief Revenue & Marketing Officer for DIRECTV ¶ 13 (“Guyardo Decl.”); *see also* Lee Decl. ¶ 42 (“For a significant number of consumers, OTT services are a complement to traditional facilities-based MVPD services. And, for an increasing percentage of households, OTT is becoming a competitive substitute to MVPD services.”).

³¹ Guyardo Decl. ¶ 13; *see also id.* (“OTT today is already both a complement to and substitute for . . . MVPD[] service Tellingly, new terms have entered the lexicon to capture a new range of possibilities, such as ‘cord cutters’ (*i.e.*, those who drop MVPD service entirely for OTT service), ‘cord shavers’ (*i.e.*, those who reduce their MVPD service and supplement with OTT service), and ‘cord nevers’ (*i.e.*, those who rely exclusively on OTT or over-the-air broadcast for television and have never subscribed to an MVPD).”). It is worth noting that, prior to entering into this transaction, DIRECTV was considering ways to compete with OVDs like Netflix and Hulu by offering lower-priced OTT pay-TV packages marketed to the cord cutters and cord nevers. Since announcement of the merger, “[t]hat’s all changed now.” S. Derek Turner, *Why the AT&T-DirectTV Deal Is the Dumbest, most Wasteful Deal Ever (at least Since Comcast-Time Warner Cable)*, Free Press (May 19, 2014), <http://www.freepress.net/blog/2014/05/19/why-the-att-directv-deal-dumbest-most-wasteful-deal-ever>; *see also* Antoine Gara, *DirectTV Alludes to Over-the-Top Video Offering*, TheStreet (Sept. 25, 2013), <http://www.thestreet.com/story/12048779/1/directv-alludes-to-over-the-top-video-offering.html>.

³² *See* Application at 28-29 (“Millions of consumers will be able to choose enhanced video products and new integrated bundles of broadband/video services.”); *id.* at 29-30 (“Post-transaction, AT&T and DIRECTV will be able to marry their complementary assets and expertise to offer consumers improved video services and better and more competitive bundles of MVPD and broadband services.”); *id.* at 29 (“The transaction will position the combined company to meet consumers’ evolving video preferences and, in particular, to propel the development of new OTT products.”); *Hearing on the Proposed Merger of AT&T and DIRECTV Before the House Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 113th Cong. (June 24, 2014) (“House Hearing”) (Statement of Randall Stephenson, Chairman, CEO and President, AT&T), at 1, *available at* <http://judiciary.house.gov/cache/files/f6c337d5-a54e-4681-b611-88f1443a2e71/stephenson-testimony.pdf> (last visited Sept. 15, 2014) (“This transaction is . . . about providing consumers with the integrated video and broadband Internet services they want, delivered over any type of device, to nearly anywhere in the country.”) (“Stephenson Statement”).

³³ *See House Hearing* (Statement of John Bergmayer, Senior Staff Attorney, Public Knowledge), at 11, *available at* <http://judiciary.house.gov/cache/files/fbf5aabf-d9a5-45d4-8ef7-98506911859f/bergmayer-testimony.pdf> (last visited Sept. 15, 2014) (“Of course, new competition in the

increasingly a product consumers do not want due to its ever-increasing prices and inflexible content offerings.³⁴ Worse yet, Applicants concede that the merger may increase prices for standalone video or broadband, an outcome clearly not in the public interest for the ever-growing segment of consumers who wish only to consume their video content over the Internet.³⁵

B. The Merged Firm Will Have Greater Leverage To Discriminate Against Unaffiliated Content By Degrading Interconnection Points With Other Networks And By Extracting Payments From Competitive Services.

The strengthened incentives to discriminate against unaffiliated content will only further motivate the merged firm to continue AT&T's anticompetitive practice of allowing interconnection points between its last-mile network and backbone networks like Cogent to

video marketplace (whether online or otherwise) could benefit consumers, provided it was made available to customers of any ISP or wireless carrier. But, as a vertically integrated ISP, AT&T would have the incentive to discriminate in favor of its own services, and to make an online video product available only to its own broadband subscribers.”). One way MVPDs currently discriminate against unaffiliated content is by requiring passwords and imposing geographic restrictions on consumers’ abilities to consume the MVPDs’ TV Everywhere offerings. As a result, “TV Everywhere merely expands the bundle,” and “[p]artial or full foreclosure of OVDs thus diminishes the value consumers derive from content made available via their broadband connections and also their freedom in how they reach that content.” Petition to Deny of Netflix, Inc., MB Docket No. 14-57 (filed Aug. 25, 2014), at 93 (“Netflix Petition to Deny”).

³⁴ See Application at 75, 77 (acknowledging that “OTT content is rapidly becoming an alternative to standalone video services,” and that OTT demand is driven by its flexibility and ubiquity); *Hearing on The AT&T/DirecTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond Before the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 113th Cong. (June 24, 2014) (“Senate Hearing”) (Statement of Christopher Keyser, President, Writers Guild of Am., W.), at 6, available at <http://www.judiciary.senate.gov/imo/media/doc/06-24-14KeyserTestimony.pdf> (last visited Sept. 15, 2014) (noting that Netflix, Hulu, Bloomberg Television, and The Tennis Channel, among others, “begin to create the possibility for consumers to build their own, more flexible content bundles. Such a development reclaims some control for consumers who would otherwise have no alternative but to pay the ever-increasing cost of a bundled cable and Internet package.”).

³⁵ See Application at 83 (arguing that “downward pressure” on prices for bundles as a result of the merger will outweigh “[a]ny upward pressure on the prices of standalone video or broadband offered by the merged firm”); see also Cecilia Kang, *AT&T, DirecTV merger could make it harder to cut the cord*, Wash. Post (June 11, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/06/11/att-directv-merger-could-make-it-harder-to-cut-the-cord/> (noting that while the merger may result in lower bundle prices, such result is only a benefit to “consumers who want to keep on paying for television services like satellite and cable. And many polls . . . show consumers are moving in the opposite direction. Cable subscriptions have been flat or declining for decades, and consumers say they would cut the cord if there was more content—particularly live sports—available online.”).

become congested, thereby discriminating against unaffiliated edge providers who use backbone networks like Cogent to deliver the Internet traffic that AT&T's customers request and for which they already pay AT&T. Despite its promises to work with, and not against, unaffiliated edge providers,³⁶ the best indication of the merged entity's future behavior is that of its past. As such, the Commission should give more weight to AT&T's discriminatory actions with respect to backbone networks and the edge providers who seek to transmit content over those backbone networks than to the words Applicants use to obtain approval of the transaction. This is a critical matter of public interest concern because, as everyone understands, the *only* way to reach an AT&T broadband subscriber is by connecting with AT&T's last-mile network, whether through a transit provider, a direct peering arrangement, or a content delivery network.

AT&T is among the group of American ISPs who have refused to continue upgrading capacity at interconnection points between its last-mile broadband network and Cogent's network.³⁷ Tellingly, such refusals came only after Cogent began carrying a large amount of

³⁶ See Application at 79 ("Rather than attempting to discriminate against OTT video, traditional MVPDs are investing in their own OTT offerings and encouraging the growth of third-party OTT video. Like its competitors, the combined company will have a strong incentive to promote OTT video, both to grow its wireline and mobile broadband business and to respond to marketplace demands."); Stephenson Statement at 7 ("Likewise, because our core business will remain the wireless and wireline delivery of broadband, we will have every incentive to work with, rather than against, the new generation of over the top providers of interactive and video services like Netflix, Amazon, and Google. Our broadband and mobile Internet access services depend on creating and delivering that rich environment of cutting edge content, and that is increasingly so in this new video age."); Comments of AT&T Inc., GN Docket Nos. 14-28 and 10-127 (filed July 17, 2014), at 16 (arguing that ISPs have incentives to "maximize the value of their service to both end users and edge providers. And the best path to that end is to offer end users what they want—namely, unfettered access to all safe and lawful Internet content, applications, and services."); *id.* at 17 ("Considerable economic research supports this common-sense notion. A broadband platform provider has strong and rational market-driven incentives to deal evenhandedly with independent application providers because to behave otherwise would ultimately decrease, not increase, the value of its platform.") ("AT&T Open Internet Comments").

³⁷ See Comments of Cogent Commc'ns Grp., Inc., GN Docket No. 14-28 (filed Mar. 21, 2014), at 18 (detailing Verizon's practices of allowing congestion at interconnection points) ("Cogent March 21, 2014 Comments"); Petition to Deny of Cogent Commc'ns Grp., Inc., MB Docket No. 14-57 (filed Aug. 25, 2014), at 27 (detailing Comcast's practices of allowing congestion at interconnection points) ("Cogent Petition to Deny").

Netflix traffic.³⁸ Indeed, only after Cogent started carrying Netflix traffic did AT&T begin suggesting that Cogent and AT&T should reassess the settlement-free nature of their relationship based on the purported significance of traffic ratios. The timing is particularly suspect because historically, as Tier 1 networks, AT&T and Cogent peered on a settlement-free basis.³⁹ There is no valid cost or legitimate business justification for this change in position. The costs to upgrade port capacity are minimal for Tier 1 networks and were routinely shared between AT&T and Cogent.⁴⁰ Never, however, had Cogent paid AT&T a toll for delivering any traffic. Further underscoring the absence of any cost justification for its decision, AT&T declined Cogent's recent offer to pay the capital costs to upgrade capacity.⁴¹

AT&T's recent dealings with Netflix shed further light on its motivations for creating congestion. First, AT&T refused Netflix's offer to connect directly with Netflix over Netflix's Open Connect platform.⁴² Then, it degraded its subscribers' Netflix experience by refusing to

³⁸ See Declaration of Henry (Hank) Kilmer, Vice President, IP Engineering, Cogent Commc'ns Grp., Inc., MB Docket No. 14-57 (filed Aug. 25, 2014) at 13 n.4 (noting that Cogent has carried Netflix traffic to AT&T) ("Kilmer Decl.").

³⁹ See Kilmer Decl. ¶¶ 14, 32 (describing and identifying Tier 1 networks). "From Cogent's perspective, this [traffic ratio] requirement is irrational and exists only to create a pretext for denying peering arrangements a network otherwise wants to avoid or to obtain some perceived negotiating leverage." *Id.* at ¶ 17.

⁴⁰ See *id.* ¶¶ 19-20 (explaining Tier 1 networks' practices and costs with respect to port upgrades).

⁴¹ See Press Release, *Cogent Offers to Pay Capital Costs Incurred by Major Telephone and Cable Companies Necessary to Ensure Adequate Capacity*, Cogent Commc'ns Grp. (March 21, 2014), available at <http://www.cogentco.com/en/news/press-releases/631-cogent-offers-to-pay-capital-costs-incurred-by-major-telephone-and-cable-companies-necessary-to-ensure-adequate-capacity> (last visited Sept. 15, 2014).

⁴² See Declaration of Joseph Farrell, DPhil, MB Docket No. 14-57 (filed Aug. 25, 2014), ¶ 133 ("Farrell Decl.") ("[B]y late 2013, small and mid-sized ISPs such as Cablevision, RCN, and Cox had signed up for Open Connect, but the largest ISPs, such as Comcast, TWC, AT&T, and Verizon, had not."); Netflix Petition to Deny at 49 (describing Open Connect, a single-purpose CDN that stores the most popular Netflix content at interconnection points with a last-mile ISP, as a means to ensure "that its member receive Netflix's programming in high-quality video formats without rebuffering or other performance issues" and noting that "none of the U.S.'s four major ISPs, [Comcast, Verizon, AT&T and TWC], has agreed to partner with Open Connect without payment").

upgrade port capacity at interconnection points with Cogent.⁴³ The only way Netflix could remedy the problem—manifested in its customers experiencing long buffering delays and in some cases, a complete inability to stream Netflix video⁴⁴—was to pay AT&T directly.⁴⁵

AT&T's ability to extract a payment from Netflix for delivering content requested and paid for by AT&T broadband subscribers is a vivid demonstration of the raw exercise of its market power. AT&T was able to degrade its own subscribers' viewing experience⁴⁶ because its subscribers had limited substitutes for AT&T's service, while Netflix, operating in a highly competitive market, could not withstand persistent, degraded viewing experiences for "such a large portion of its subscribers."⁴⁷ As Netflix makes clear, "this threat of foreclosure gives large

⁴³ See Farrell Decl. ¶ 137 and Figures 12, 14 (attached hereto as Exhibit 1, Figures 1 and 2, respectively) (depicting percentage of time AT&T's interconnection points with Cogent were at 70% and 90% capacity, respectively, from January 2012 to April 2014). It is worth noting that even if AT&T's conduct was motivated by a desire to thwart the competitive vitality of Netflix, the consequence of its deliberate congestion-creating strategy had a broader effect. Once the Cogent/AT&T ports became congested, AT&T broadband subscribers would experience degraded performance in other bandwidth-intensive and latency-sensitive content or applications that traversed the Cogent network. Moreover, such congestion was not attributable to capacity or other performance issues on Cogent's network. See Kilmer Decl. ¶ 7 ("Cogent [] continually increase[s] the capacity of its network as necessary to avoid congestion and packet loss Any sustained packet loss experienced by Cogent's customers can be attributed to congested interconnection points with our peering partners, which is outside of Cogent's sole control.").

⁴⁴ Netflix Petition to Deny at 47 (describing effects of congestion on streaming video, including "rebuffering and the 'pixilation, freeze frames, audio garbling, etc., [that] effectively destroys a video watching experience for the end user'" (citation omitted)).

⁴⁵ *Id.* at 59 ("Comcast was the first large terminating access network to successfully implement a 'congest transit pipes' peering strategy to extract direct payment from Netflix, but it is not the only one to do so. Since agreeing to pay Comcast, Netflix also has agreed to pay TWC, AT&T and Verizon for interconnection.").

⁴⁶ Such degradation may be a result AT&T and others intended, as a 2012 study found that streaming video viewers will leave a video if it takes more than two seconds to start, with each one-second incremental delay resulting in a 5.8% increase in the abandonment rate. See S. Shunmuga Krishnan & Ramesh K. Sitaraman, *Video Stream Quality Impacts Viewer Behavior: Inferring Causality Using Quasi-Experimental Designs*, Univ. Mass. & Akamai Techs. 1 (Nov. 14, 2012), available at https://people.cs.umass.edu/~ramesh/Site/HOME_files/imc208-krishnan.pdf (last visited Sept. 15, 2014). If AT&T's competing video offerings do not experience such delays, consumers may be more likely to view video content through AT&T's proprietary services.

⁴⁷ Netflix Petition to Deny at 51; see also Declaration of Ken Florance, Vice President of Content Delivery, Netflix, Inc., MB Docket No. 14-57 (filed Aug. 25, 2014), ¶ 60 ("A content provider like an

ISPs the ability to extract terminating access fee[s] from OVDs. And the larger the ISP, the more bargaining power it has over an OVD in negotiating such access fees because failure to reach an agreement with a terminating access network that accounts for a very large portion of an OVD's customers could have a devastating effect on the finances of the OVD.”⁴⁸

AT&T's ability and incentive to exercise this market power will only be strengthened by the acquisition of DIRECTV and its millions of customers. The merged firm, with its increased scope and scale, will have all the more power to engage in this discriminatory behavior vis-à-vis innovative and nascent edge providers that compete with its video offerings, as well as transit

OVD that faces high fixed costs and, therefore must have national access to consumers to maintain financial viability, has no ability to switch away from one of these four networks, [AT&T, Comcast, Verizon, and TWC].”).

⁴⁸ Netflix Petition to Deny at 51; *see also* Farrell Decl. ¶ 141 (“[L]arge consumer ISPs pursued a course of conduct (declining to add capacity) that risked degrading, and did degrade, their subscribers’ user experience [T]his episode appears to support the view that larger ISPs are tougher and more powerful bargainers, and is evidence against [the] view that large cable ISPs could not degrade, and/or would not risk degrading, their subscribers’ user experience.”). If one substitutes the word “telco” for “cable,” Dr. Farrell’s observation is equally applicable here.

Nor can AT&T reasonably anticipate that its subscribers would switch to another ISP in the face of such degradation. *See* AT&T Open Internet Comments at 17-18 (“Indeed, any broadband Internet access provider that prevents innovative new content and applications from using its platform would inflict considerable harm on itself because most consumers could switch to a different provider that does not engage in such self-defeating behavior.”). As is well documented, the ability to switch ISPs is low in light of limited broadband offerings; moreover, the costs of switching are high. *See* Cogent Petition to Deny at 18-21; Farrell Decl. ¶ 55; Tom Wheeler, Chairman, FCC, Prepared Remarks at the 1776 Headquarters, *The Facts and Future of Broadband Competition* (Sept. 4, 2014), at 4 (“Counting the number of choices the consumer has one the day before their Internet service is installed does not measure their competitive alternatives the day after. Once consumers choose a broadband provider, they face high switching costs that include early-termination fees, and equipment rental fees. And, if those disincentives to competition weren’t enough, the media is full of stories of consumers’ struggles to get ISPs to allow them to drop service.”) (“Wheeler September 4 Remarks”) *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf, (last visited Sept. 15, 2014). In contrast, one can unsubscribe from Netflix in just three clicks. Netflix Petition to Deny at 48.

providers like Cogent, if the Commission approves the transaction without any conditions to counteract such incentives and abilities.⁴⁹

IV. AT&T's & DIRECTV's Deal "Sweeteners" Will Not Remedy The Competitive Harms Presented By The Transaction.

AT&T and DIRECTV offer a number of voluntary commitments in an effort to gain the Commission's approval of the merger. These "sweeteners," however, do not ameliorate the increased incentives and bargaining power to discriminate against unaffiliated edge providers, and thus would not make the transaction in the public interest.

First, AT&T offers to abide by the now-vacated *Open Internet Order* for three years following the closing of the merger.⁵⁰ This commitment will not prevent the merged firm from exercising its increased bargaining power with edge providers and transit providers regarding interconnection. As the Commission has made clear, the *Open Internet Order* does not cover interconnection.⁵¹ The Commission thus far has taken the same view in its ongoing rulemaking: any new Open Internet rules will not apply to "the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of

⁴⁹ See AAI Comments at 18-19 ("Post-merger gatekeeping strategies potentially include exploiting greater bargaining power in negotiations with upstream content rivals, thus raising their costs and making it more difficult for them to compete. A merged [AT&T-DIRECTV] could also extract higher tolls from middle market participants for direct or priority access to [AT&T-DIRECTV's] ISP networks, thus raising their costs. An important part of this analysis is considering how different transit, peering, and interconnection arrangements involving middle market participants and last-mile ISP networks are possible substitutes for one another."). Again, although the AAI comments were submitted in connection with Comcast/TWC transaction, the exact same concerns arise here.

⁵⁰ See Application at 51.

⁵¹ See *Open Internet Order* at 17944 ¶ 67 n.209 ("We do not intend our rules to affect existing arrangements for network interconnection, including existing paid peering arrangements."). Moreover, the best evidence of the emptiness of this commitment is the fact that Comcast, itself bound by the *Open Internet Order* as a result of conditions associated with its acquisition of NBC Universal, engaged in precisely the same sort of interconnection strategy as AT&T. See Cogent Petition to Deny at 24-28 and Netflix Petition to Deny at 52-60 (both detailing Comcast's discriminatory interconnection practices). Thus, Applicants' statement that their commitment to the *Open Internet Order* "ensures that the broadband environment remains conducive to further OTT growth and encourages the development of even greater OTT options for consumers" deserves no credence. Application at 79.

inter-network transmission of data”⁵² Cogent—along with many others—believes that tentative conclusion is wrong and at odds with the very policy goals underlying the *Open Internet Order* and reiterated in the Open Internet NPRM.⁵³ Unless the Commission’s view changes, any commitment by AT&T to abide by the *Open Internet Order* would not address a core mechanism by which the merged company will be able to exercise its market power against OVDs and transit providers.⁵⁴

Second, AT&T’s offer to continue to offer standalone wireline broadband service “at reasonable market-based prices” for three years after the closing of the merger will not adequately protect end users and edge providers from the anticompetitive incentives and abilities the merged firm will gain to discriminate against unaffiliated content.⁵⁵ Contrary to AT&T’s assertion, this commitment will not “guarantee benefits for those customers who want only a broadband service and may choose to consume video through OTT services like Netflix or Hulu.”⁵⁶ A mere three-year commitment to service “cord cutters” and “cord nevers” is hardly a guarantee, especially when this guarantee will not curb the type of anticompetitive conduct with

⁵² *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 ¶ 59 (May 15, 2014) (“Open Internet NPRM”).

⁵³ See Reply Comments of Cogent Commc’ns Grp., Inc., GN Docket Nos. 14-28 and 10-127 (filed Sept. 15, 2014), at 6 n.16, 7 n.20, 18 nn. 54-55 (compiling comments) (“Cogent Reply Comments”).

⁵⁴ See Comments of Cogent Commc’ns Grp., Inc., GN Docket Nos. 14-28 and 10-27 (filed July 15, 2014), at 6-9 (“Cogent July 15, 2014 Comments”); Cogent Reply Comments at 11, 12.

⁵⁵ Application at 50. AT&T offers more specifics, stating it will offer “a service with speeds of at least 6 Mbps down (where feasible) at a 12-month price no greater than \$34.95 per month (provided that the price can be increased by no more than any increase in the Consumer Price Index for All Urban Consumers (CPI-U) for Communications every 12 months starting 12 months following deal close).” *Id.* Moreover, speeds of 6 Mbps “where feasible” are hardly something to tout in today’s bandwidth-intensive world. See Wheeler September 4 Remarks at 2 (“But let’s be clear, this [4 Mbps] is ‘yesterday’s broadband.’ Four megabits per second isn’t adequate when a single HD video delivered to home or classroom requires 5 Mbps of capacity. This is why we have proposed updating the broadband speed required for universal service support to 10 Mbps. But even 10 Mbps doesn’t fully capture the increasing demand for better wired broadband, of which downstream speed is, of course, only one component.”).

⁵⁶ Application at 50.

respect to interconnection in which AT&T has already engaged and will have every incentive to continue. Even if the merged entity cannot as easily sell its proprietary video services to customers who purchase a broadband-only service, it would still be able to manipulate interconnection practices with other networks and edge providers to the detriment of disfavored content and applications and, ultimately, consumers.

In sum, AT&T's and DIRECTV's promises are inadequate and other conditions are necessary to address the anticompetitive impacts of this merger and to ensure that its consummation is in the public interest. As such, the Commission should approve this merger only if it imposes the conditions discussed below. Moreover, if AT&T and DIRECTV are serious about their commitment to working with, rather than against, edge providers, and want to compete more effectively with Comcast and TWC, then agreeing to the conditions proposed below is in the Applicants' best interest.

V. Should It Approve This Merger, The Commission Must Take Action To Ameliorate Its Anticompetitive Effects By Imposing Conditions Related To Interconnection.

The Commission should impose the same conditions on the Applicants that Cogent has proposed in the Comcast/TWC merger proceeding.⁵⁷ While these conditions are supported in part by Dr. Farrell's economic analysis submitted in that particular proceeding, many of the same competitive (and anticompetitive) dynamics he observes are present here.⁵⁸ Moreover, the conditions Cogent recommends are necessary to give the Commission, consumers, and other

⁵⁷ See Cogent Petition to Deny at 36-42.

⁵⁸ For example, Dr. Farrell's conclusion that the relevant broadband market likely extends only to fixed wireline technologies applies here. See Farrell Decl. ¶¶ 49-51. Like Comcast, the merged AT&T/DIRECTV "will have a bigger footprint and will thus internalize a greater proportion of the anticompetitive benefits" of the merger. *Id.* ¶ 80. Likewise, many of Dr. Farrell's conclusions are based on Netflix's and Cogent's experience with Comcast, which, as detailed above, is not unlike their respective experiences with AT&T. See *id.* ¶¶ 130-141, 145. As Netflix's speed data indicate, a similar pattern of small cable ISPs outperforming Comcast "applies to telecom carriers: for DSL connections, AT&T and Verizon trail smaller consumer ISPs, and the gap has been increasing lately." *Id.* ¶ 143.

industry participants the opportunity to adjust to the new competitive pressures that will result in a post-consolidation world.

AT&T's merger with DIRECTV comes at the same time that the Commission is considering a variety of matters that affect the future of broadband. The Commission is evaluating the proposed merger of Comcast and TWC,⁵⁹ developing new Open Internet rules,⁶⁰ weighing mechanisms to expand municipal broadband services,⁶¹ and studying interconnection.⁶² This merger might not be so problematic if the Commission had adopted robust Open Internet protections that specifically address the means by which residential broadband providers can degrade competitive, unaffiliated video content and VoIP services without specifically targeting a particular edge provider. After all, AT&T is not alone in its discriminatory conduct; Comcast, Verizon, and TWC, the nation's largest residential ISPs, are also offenders.⁶³ Yet to date, the Commission has not embraced an industry-wide solution. So while the anticompetitive practices with respect to interconnection are an industry-wide problem, absent a change of course the Commission must address these issues on a case-by-case basis. This merger, like the Comcast/TWC merger, presents such a case. The present transaction is one of many that is driving the telecommunications industry toward an oligopoly nationally and is entrenching

⁵⁹ See *Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable, Inc., Charter Communications, Inc. and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Public Notice, MB Docket No. 14-57, DA 14-986 (July 10, 2014).

⁶⁰ See generally Open Internet NPRM.

⁶¹ See Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, Public Notice, WCB Docket Nos. 14-115 and 14-116, DA 14-1072 (July 28, 2014).

⁶² See Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion (July 13, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf (last visited Sept. 15, 2014).

⁶³ See Cogent March 21, 2014 Comments at 16, 18; Cogent July 15, 2014 Comments at 16 n.44, 19-22, 24 n.67; Cogent Petition to Deny at 25-28.

monopolies or duopolies locally.⁶⁴ As such, the Commission, consistent with its statutory mandate to ensure that any transfer of licenses is consistent with the public interest, needs to ensure that the merger will not exacerbate the anticompetitive incentives and practices that already exist.⁶⁵ To that end, the conditions Cogent proposes are as follows:

First, to the extent not, or not yet, adopted as a rule of general applicability (or if adopted and subsequently reversed by the D.C. Circuit), the merged AT&T/DIRECTV should be subject to the enhanced transparency requirements set forth in Cogent's March 21, 2014 and July 15, 2014 comments in the Open Internet proceeding.⁶⁶ Doing so will ensure that the Commission, the public, and other firms in the Internet distribution chain have access to comprehensive and timely information that will permit the prompt detection of behavior that is discriminatory or otherwise inconsistent with the public interest. Moreover, a robust disclosure regime may serve to deter conduct that is anticompetitive and antithetical to the public interest from materializing in the first instance.

⁶⁴ See *House Hearing* (Statement of Ross Lieberman, Am. Cable Ass'n), at 1, *available at* <http://judiciary.house.gov/cache/files/b74093f2-1c8b-4a46-8646-017a68cbced4/lieberman-testimony.pdf> (last visited Sept. 15, 2014) ("The cumulative impact of these transactions will transform the industry, the competitive marketplace and the consumer experience and should be cause for concern."). The fact that Cogent is urging the Commission to take action with respect to this merger and the Comcast/TWC merger is not a suggestion that companies like Verizon should be exempt from rules governing anticompetitive interconnection practices.

⁶⁵ Applicants may argue that every merger must be considered in its own right and that issues of industry-wide concern should be addressed in an industry-wide proceeding. Cogent does not disagree with these general propositions. However, at the same time, when evaluating the merits of a particular transaction, the Commission cannot ignore the overall state of competition in the industry or the regulatory environment in which a particular deal is being presented. Ignoring such factors would be contrary to both the real world in which Applicants wish to operate their combined business and Commission precedent. See *Comcast/NBC Universal Order* at 4248 ¶ 24 ("[T]he Commission considers whether a transaction will enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue."); *Worldcom/MCI Order* at 18025 ¶ 9 (noting that the Commission may evaluate the transaction's effect on the industry by looking at "the trends within, and needs of, the telecommunications industry," as well as "the nature, complexity, and rapidity of change in the telecommunications industry").

⁶⁶ Cogent March 21, 2014 Comments at 10-17; Cogent July 15, 2014 Comments at 23-25; *see also* Cogent Reply Comments at 24-31.

Second, the Commission should require that, if any interconnection point between the combined AT&T/DIRECTV and another network with whom it interconnects reaches 70% capacity, then AT&T/DIRECTV must promptly undertake to upgrade the ports and cross-connects (on terms and conditions equivalent to then-existing agreements with such networks) to augment capacity and thereby avoid the congestion and resulting packet loss that will occur if the interconnection capacity extends much beyond that point.⁶⁷

Third, the Commission should require the combined AT&T/DIRECTV to, for a period of seven years following consummation of the merger, maintain settlement-free peering relationships with any network with whom AT&T had such a relationship as of May 18, 2014, the date AT&T and DIRECTV announced the proposed transaction.⁶⁸ This condition would ensure that edge providers can use Tier 1 backbone networks to provide a cost-efficient and reliable means to reach AT&T/DIRECTV customers instead of being compelled to enter into paid, direct interconnection agreements with AT&T/DIRECTV.⁶⁹ Notably, it would not preclude such direct-connect agreements. Rather, it would ensure that options exist for those who cannot, or choose not to, pursue other means of reaching AT&T/DIRECTV subscribers.

⁶⁷ See Cogent Petition to Deny at 39-40 (explaining (1) why this condition is critical in a world where dedicated access agreements are permitted and (2) that this condition would not prevent dedicated access agreements).

⁶⁸ Press Release, AT&T to Acquire DIRECTV (May 18, 2014), *available at* http://about.att.com/story/att_to_acquire_directv.html (last visited Sept. 11, 2014). This condition, coupled with the condition addressing the augmentation of capacity at interconnection points, will ensure that affordable, high-quality transit alternatives remain for edge providers to reach AT&T/DIRECTV customers who have already paid for access to all lawful Internet content. Of course, this condition would not limit the merged entity's ability to enter into additional settlement-free peering arrangements with other networks should it deem it in its interest to do so. The point here is to preserve the *status quo ante* for a defined period of time so that the combined AT&T/DIRECTV cannot exercise its enhanced market power in ways that interfere with the competitive transit market that exists today. See Kilmer Decl. ¶¶ 30-41 (discussing the state of competition in the transit market).

⁶⁹ See Cogent Petition to Deny at 40-41.

Fourth, the Commission should prohibit the combined AT&T/DIRECTV from engaging in unreasonable network management practices with respect to interconnection. One way to craft this condition is to make explicit that the “reasonable network management” carve-out in the *Open Internet Order*⁷⁰—as applied to the merged entity through the Applicants’ voluntary commitment—is not limited to management only within AT&T/DIRECTV’s own network, but that the merged entity’s practices with respect to other networks or edge providers with whom it interconnects are also subject to this reasonableness standard. The purpose of this condition is to ensure that the merged AT&T/DIRECTV cannot do indirectly what it already is prohibited from doing directly: discriminate against particular Internet content.

VI. Conclusion

This merger will give the combined AT&T and DIRECTV an enormous amount of control over the means by which tens of millions of Americans access the vast and growing array of innovative, affordable, and consumer-driven Internet content. At the same time, and as a result of their massively increased footprint and subscriber base and their vertically integrated content interests, Applicants will gain strengthened incentives and leverage to stifle edge providers’ efforts to reach the merged entity’s customers in a cost-effective manner. Therefore, Cogent urges the Commission to adopt the conditions set forth above if it is to find that the merger is in the public interest and approve the applications.

⁷⁰ See *Open Internet Order* at 17951-56 ¶¶ 82-92.

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Respectfully submitted,

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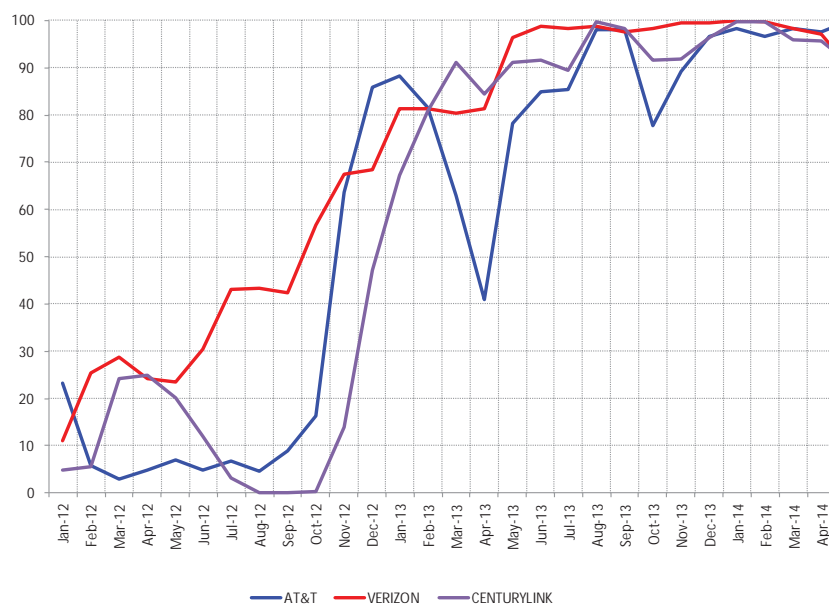
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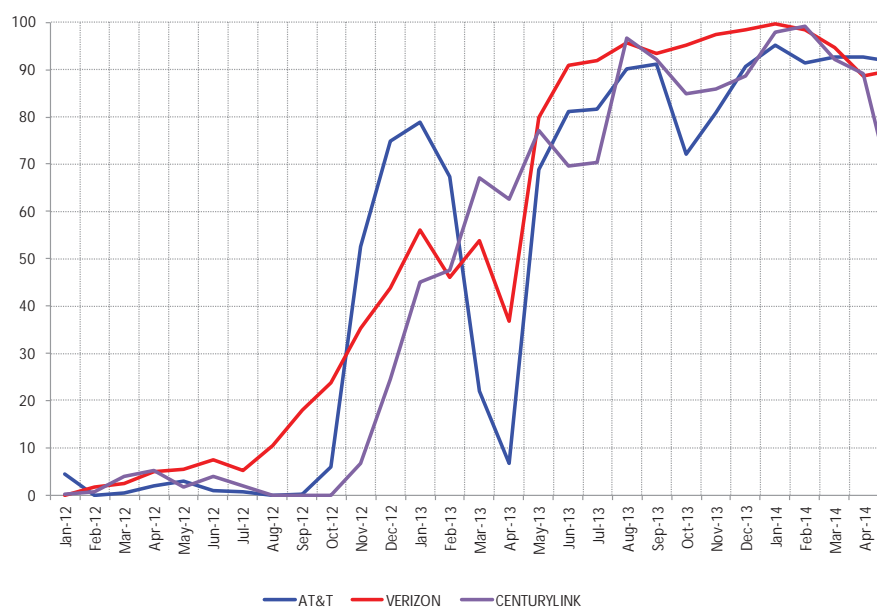
EXHIBIT 1

Figure 1. Percentage of the prime time period when Cogent interconnection ports with selected telecoms are used at more than 70% port capacity



Source: Bates White calculations based on Cogent data.

Figure 2. Percentage of the prime time period when Cogent interconnection ports with selected telecoms are used at more than 90% port capacity



Source: Bates White calculations based on Cogent data.